



CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1239

[Docket No. CPSC-2019-0014]

Safety Standard for Gates and Enclosures

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: Consistent with the CPSIA's process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard, this direct final rule updates the mandatory standard for gates and enclosures to incorporate by reference to ASTM F1004-22.

DATES: The rule is effective on January 21, 2023, unless CPSC receives a significant adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If CPSC receives such a comment, it will publish a notification in the *Federal Register*, withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 21, 2023.

ADDRESSES: You can submit comments, identified by Docket No. CPSC-2019-0014, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: www.regulations.gov. Follow the instructions for submitting comments. CPSC typically does not accept comments submitted by electronic mail (email), except as described below. CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal.

Mail/hand delivery/courier Written Submissions: Submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7479. If you wish to submit

confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or courier, or you may email them to: cpsc-os@cpsc.gov.

Instructions: All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: www.regulations.gov. Do not submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier/confidential written submissions.

Docket: For access to the docket to read background documents or comments received, go to: www.regulations.gov, and insert the docket number, CPSC-2019-0014, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Carlos Torres, Project Manager, Division of Mechanical and Combustion Engineering, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: (301) 987-2504; e-mail: ctorres@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

1. Statutory Authority

Section 104(b)(1) of the CPSIA requires the Commission to assess the effectiveness of voluntary standards for durable infant or toddler products and to adopt mandatory standards for these products. 15 U.S.C. 2056a(b)(1). A mandatory standard must be “substantially the same as” the corresponding voluntary standard, or it may be “more stringent than” the voluntary

standard, if the Commission determines that more stringent requirements would further reduce the risk of injury associated with the product. *Id.*

Section 104(b)(4)(B) of the CPSIA specifies a process for updating the Commission's rules when a voluntary standards organization revises a standard that the Commission previously incorporated by reference under section 104(b)(1). First, the voluntary standards organization must notify the Commission of the revision. Once the Commission receives this notification, the Commission may reject or accept the revised standard. The Commission may reject the revised standard by notifying the voluntary standards organization, within 90 days of receiving notice of the revision, that it has determined that the revised standard does not improve the safety of the consumer product and that it is retaining the existing standard. If the Commission does not take this action to reject the revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision or on a later date specified by the Commission in the *Federal Register*. 15 U.S.C. 2056a(b)(4)(B).

2. Safety Standard for Gates and Enclosures

Under section 104(b)(1) of the CPSIA, the Commission adopted a mandatory rule for gates and enclosures, codified in 16 CFR part 1239. The rule incorporated by reference ASTM F1004-19, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures*, with two modifications. 85 FR 40100 (July 6, 2020). The standard is intended to address head and neck entrapment in children's expansion gates and expandable enclosures, and the ability of pressure gates to resist a push-out force.

In 2021, ASTM revised the voluntary standard to align with the two modifications contained in 16 CFR part 1239, by adding the following requirements for pressure-mounted gates:

- For pressure-mounted gates that rely on wall cups to meet the 30-lb push-out force test, the gates must include a separate warning label (regarding correct installation) in a conspicuous location on the top rail; or
- For pressure-mounted gates that do not use wall cups, the gates must use visual side-pressure indicators to provide feedback on whether the gate is installed correctly.

Because the revised voluntary standard aligned with the mandatory standard, the Commission published a direct final rule on September 28, 2021, to update 16 CFR part 1239 to reflect incorporation by reference of ASTM F1004-21, with no modifications (86 FR 53535).

On June 1, 2022, ASTM approved and published a further revision, ASTM F1004-22. ASTM notified CPSC of the revision on July 25, 2022. On August 4, 2022, the Commission published a Notice of Availability in the *Federal Register*, requesting comment on whether the revision improves the safety of gates and expandable enclosures (87 FR 47729). Public comment closed on August 18, 2022, and CPSC did not receive any comments.

As discussed in section **B. Revisions to ASTM F1004**, based on CPSC staff's review of ASTM F1004-22,¹ the Commission will allow the revised voluntary standard to become the mandatory standard.² Accordingly, by operation of law under section 104(b)(4)(B) of the CPSIA, ASTM F1004-22 will become the mandatory consumer product safety standard for gates and enclosures on January 21, 2023. 15 U.S.C. 2056a(b)(4)(B). This direct final rule updates 16 CFR part 1239 to incorporate by reference the revised voluntary standard, ASTM F1004-22.

B. Revisions to ASTM F1004

The ASTM standard for gates and enclosures includes performance requirements, test methods, and requirements for marking, labeling, and instructional literature, to address hazards to children associated with expandable gates and enclosures. The CPSC's current mandatory

¹ CPSC staff's briefing package regarding ASTM F1004-22 is available at: [INSERT LINK].

² The Commission voted TBD-TBD to approve this notice.

standard Safety Standards for Gates and Enclosures in 16 CFR part 1239 incorporates by reference ASTM F1004-21, with no modifications.

The revision to ASTM F1004-22 consists of changes to the illustrated examples of warning labels referenced as Figures in Section 8.4.7. The warning statement: “You MUST install wall cups to keep the gate in place. Without wall cups, child can push out and escape” was removed from Figures 8 through 10, and the same warning statement is shown as a standalone label in a new Figure 11. This change reflects the requirement in Section 8.5.7 for pressure-mounted gates to have a separate warning, specific to installation of wall cups, if the design of that gate relies on the wall cups to meet the push-out force requirements.

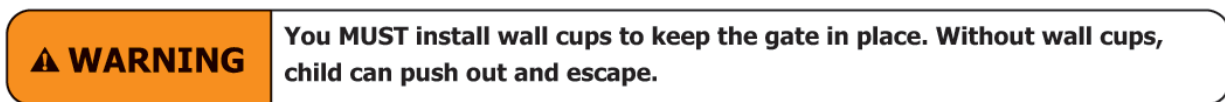


FIG. 11 Example Separate Wall Cup Installation Warning

Under section 104(b)(4)(B) of the CPSIA, unless the Commission notifies ASTM that it's revision to a voluntary standard that is referenced in a mandatory standard “does not improve the safety of the consumer product covered by the standard,” the revised voluntary standard becomes the new mandatory standard. The Commission determines that the substantive change in the latest revision to ASTM F1004 is an improvement to safety of the product.

When ASTM F1004 was updated in 2021 to align with CPSC's mandatory standard for gates and enclosures, the standard added the following requirement, specific to pressure-mounted gates:

- 8.5.7 Pressure-mounted gates that provide wall cups or other mounting hardware to meet the requirements of 6.3 shall have the following warning in the location specified: You MUST install [wall cups] to keep gate in place. Without [wall cups], child can push out and escape.
- 8.5.7.1 This warning shall be separate from all other warnings required on the product and shall not include any additional language.

However, the illustrated examples of warnings shown in Figures 8 through 10 were not updated to reflect that a separate warning label specific to installing wall cups is required for pressure-mounted gates that rely on such hardware to withstand push-out forces. The examples of warning labels in ASTM F1004-21 continue to show the statements to install wall cups (“You MUST install wall cups to keep the gate in place. Without wall cups, child can push out and escape.”) alongside other warning statements. The revised standard corrects the illustrated examples to reflect that specific requirement in Section 8.5.7 that warnings to install wall cups must be conveyed in a separate, standalone warning label.

This change aligns the exemplar warning labels with language in the standard emphasizing that pressure-mounted gates that rely on wall cups to meet the horizontal push-out requirements must clearly warn the consumer that the wall cups must be installed for the product to function properly. The standard requires a separate, standalone statement, and the examples of illustrated warning labels now reflect that standalone warning. The Commission concludes the change is an improvement to safety because it reinforces a message that is critical to the safe use of the product and provides an example that firms could use to meet the standard that is consistent with the requirement in the standard.

C. Incorporation by Reference

Section 1239.2 of the direct final rule incorporates by reference ASTM F1004-22. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 16 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 16 CFR 51.5(b).

In accordance with the OFR regulations, section **B. Revisions to ASTM F1004** of this preamble summarizes the major provisions of ASTM F1004-22 that the Commission incorporates by reference into 16 CFR part 1239. The standard itself is reasonably available to

interested parties. Until the direct final rule takes effect, a read-only copy of ASTM F1004-22 is available for viewing, at no cost, on ASTM's website at: <https://www.astm.org/CPSC.htm>. Once the rule takes effect, a read-only copy of the standard will be available for viewing, at no cost, on the ASTM website at: <https://www.astm.org/READINGLIBRARY/>. Interested parties can also schedule an appointment to inspect a copy of the standard at CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone: (301) 504-7479; e-mail: cpsc-os@cpsc.gov. Interested parties can purchase a copy of ASTM F2088-22 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959 USA; telephone: (610) 832-9585; www.astm.org.

D. Certification

Section 14(a) of the Consumer Product Safety Act (CPSA; 15 U.S.C. 2051-2089) requires manufacturers of products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, to certify that the products comply with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or for children's products, on tests of a sufficient number of samples by a third party conformity assessment body accredited by CPSC to test according to the applicable requirements. As noted, standards issued under section 104(b)(1)(B) of the CPSIA are "consumer product safety standards." Thus, they are subject to the testing and certification requirements of section 14 of the CPSA.

Because expandable gates and enclosures are children's products, a CPSC-accepted third party conformity assessment body must test samples of the products. Products subject to part 1239 also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA,³ the tracking label requirements in section 14(a)(5) of

³ 15 U.S.C. 1278a.

the CPSA,⁴ and the consumer registration form requirements in section 104(d) of the CPSIA.⁵

ASTM F1004-22 makes no changes that would impact any of these existing requirements.

E. Notice of Requirements

In accordance with section 14(a)(3)(B)(vi) of the CPSA, the Commission previously published a notice of requirements (NOR) for accreditation of third party conformity assessment bodies for testing gates and enclosures. 85 FR 40100 (July 6, 2020). The NOR provided the criteria and process for CPSC to accept accreditation of third party conformity assessment bodies for testing gates and enclosures to 16 CFR part 1239. The NORs for all mandatory standards for durable infant or toddler products are listed in the Commission’s rule, “Requirements Pertaining to Third Party Conformity Assessment Bodies,” codified in 16 CFR part 1112. *Id.*

ASTM F1004-22 did not change the testing requirements, testing equipment, or testing protocols for gates and enclosures. Accordingly, the revisions do not change the way that third party conformity assessment bodies test these products for compliance with the safety standard for gates and enclosures. Testing laboratories that have demonstrated competence for testing in accordance with ASTM F1004-21 are competent to test in accordance with the revised standard ASTM F1004-22. Laboratories will begin testing to the new standard when ASTM F1004-22 goes into effect, and the existing accreditations that the Commission has accepted for testing to this standard will cover testing to the revised standard. Therefore, the Commission considers the existing CPSC-accepted laboratories for testing to ASTM F1004-21 to be capable of testing to ASTM F1004-22 as well. Accordingly, the existing NOR for this standard will remain in place, and CPSC-accepted third party conformity assessment bodies are expected to update the scope of the testing laboratories’ accreditations to reflect the revised standard in the normal course of renewing their accreditations.

F. Direct Final Rule Process

⁴ 15 U.S.C. 2063(a)(5).

⁵ 15 U.S.C. 2056a(d).

On August 4, 2022, the Commission provided notice in the *Federal Register* of the revision to the standard and requested comment on whether the revision improves the safety of gates and enclosures covered by the standard. 87 FR 47729. No comments were submitted. Now, the Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551-559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency “for good cause finds” that notice and comment are “impracticable, unnecessary, or contrary to the public interest.” *Id.* 553(b)(B). The Commission concludes that when it updates a reference to an ASTM standard that the Commission incorporated by reference under section 104(b) of the CPSIA, further notice and comment are unnecessary.

Specifically, under the process set out in section 104(b)(4)(B) of the CPSIA, when ASTM notifies CPSC that it has revised a standard that the Commission has previously incorporated by reference under section 104(b)(1)(B) of the CPSIA, that revision will become the new CPSC standard, unless the Commission determines that ASTM’s revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC’s standard by operation of law. The Commission is allowing ASTM F1004-22 to become CPSC’s new standard because its provisions improve the safety of the product. The purpose of this direct final rule is to update the Code of Federal Regulations (CFR) so that it reflects the version of the standard that takes effect by statute. This rule updates the reference in the CFR, but under the CPSIA, ASTM F1004-22 takes effect as the new CPSC standard for gates and enclosures, even if the Commission does not issue this rule. Thus, public comments would not alter substantive changes to the standard or the effect of the revised standard as a consumer product safety standard under section 104(b) of the CPSIA. Under these circumstances, further notice and comment are unnecessary.

In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are

noncontroversial and not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the “unnecessary” prong of the good cause exemption in 5 U.S.C. 553(b)(B).

Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 21, 2023. In accordance with ACUS’s recommendation, the Commission considers a significant adverse comment to be “one where the commenter explains why the rule would be inappropriate,” including an assertion challenging “the rule’s underlying premise or approach,” or a claim that the rule “would be ineffective or unacceptable without a change.” 60 FR 43108, 43111 (Aug. 18, 1995). As noted, this rule merely updates a reference in the CFR to reflect a change that occurs by statute, and public comments should address this specific action.

If the Commission receives a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601-612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section **F. Direct Final Rule Process** of this preamble, the Commission has determined that further notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. CPSC also notes the limited nature of this

document, which merely updates the incorporation by reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

H. Paperwork Reduction Act

The current mandatory standard for gates and enclosures includes requirements for marking, labeling, and instructional literature that constitute a “collection of information,” as defined in the Paperwork Reduction Act (PRA; 44 U.S.C. 3501-3521). While the revised mandatory standard revises the labeling language for gates and enclosures, the revised language would not add to the burden hours because the products already require marking, labeling, and instructional literature under the current standard. The revised labeling provisions merely require different language to that already required by the standard, which would impose minimal if any additional burden because the firm is already required to put labels on the product. The Commission took the steps required by the PRA for information collections when it promulgated 16 CFR part 1223, and the marking, labeling, and instructional literature for gates and enclosures are currently approved under OMB Control Number 3041-0159. Because the information collection burden is unchanged, the revision does not affect the information collection requirements or approval related to the standard.

I. Environmental Considerations

The Commission’s regulations provide a categorical exclusion for the Commission’s rules from any requirement to prepare an environmental assessment or an environmental impact statement where they “have little or no potential for affecting the human environment.” 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

J. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement

is identical to the federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision “consumer product safety standards.” Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

K. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standards organization revises a standard that the Commission adopted as a mandatory standard, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission timely notifies the standards organization that it has determined that the revision does not improve the safety of the product, or the Commission sets a later date in the *Federal Register*. 15 U.S.C. 2056a(b)(4)(B). The Commission is taking neither of those actions with respect to the standard for gates and enclosures. Therefore, ASTM F1004-22 will take effect as the new mandatory standard for gates and enclosures on January 21, 2023, 180 days after July 25, 2022, when the Commission received notice of the revision.

L. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs determines whether a rule qualifies as a “major rule.”

Pursuant to the CRA, this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1239

Consumer protection, Imports, Incorporation by reference, Infants and children, Law enforcement, Safety.

For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II as follows:

PART 1239 – SAFETY STANDARD FOR GATES AND ENCLOSURES

1. The authority citation for part 1239 continues to read as follows:

Authority: 15 U.S.C. 2056a.

2. Revise § 1239.2 to read as follows:

§ 1239.2 Requirements for gates and enclosures.

Each gate and enclosure must comply with all applicable provisions of ASTM F1004-22, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures*, approved on June 1, 2022. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A read-only copy of the standard is available for viewing on the ASTM website at <https://www.astm.org/READINGLIBRARY/>. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959; telephone (610) 832-9585; www.astm.org. You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504-7479, e-mail cpsc-os@cpsc.gov, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, e-mail fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Alberta E. Mills,
Secretary,
Consumer Product Safety Commission.